SYARIKAT TAI YUEN SUPERMARKET (TAWAU) SDN. BHD.

v.

MERCANTILE INSURANCE SDN. BHD. & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[SUIT NO. T 338 OF 1987]
15 OCTOBER 1993

INSURANCE LAW: Agent - Whether authorised or not - Apparent or ostensible authority - More than one inference - Non-disclosure of materials facts - Proposal form incomplete.

Patricia Chai Mon Nget (PW1) a former partner of Sincere Agency (Sincere) went to see Liew Koon Siong (PW2), the managing director of the plaintiff to sell the plaintiff a fire risk policy. The proposal form was partially completed and forwarded to Sadong Agency Sdn. Bhd. (Sadong) for Sadong to complete the proposal form. PW1 knew at that time that the plaintiff had suffered previous fire, had claimed losses and had made a number of applications for insurance coverage but were rejected. Some of the question that were not answered or false answers given would constitute material facts and would influence the insurer in its discretion as to whether to sell the policy. Sadong at the material time was the underwriting agent of the defendant but Sincere was not a directed agent or sub-agent of the defendant.

Held:

[1] Authorised agent is an agent who has the actual, as distinct from apparent or ostensible, authority of the insurer. In so far as Sincere or PW1 are concerned they are not an authorised agent of the defendant since the evidence show that they were in fact not authorised agent and s. 44A of the Insurance Act 1963 cannot be resorted to by the plaintiff in so far as Sincere or PW1 are concerned. As regards Sadong it is not in dispute that it is the authorised agent of the defendant.

[2] Because more than one possibility exists regarding what happened to the proposal form after it was sent to Sadong, the Court is not justified in inferring that the answer to questions 9 and 11 of the proposal forms must have been written by Sadong. In the first place, Sadong had to act through an authorised human hand to write the answers. In this respect, there is no evidence whatsoever. The possibility exists that the answers may have been written by someone other than Sadong such as Multi-Benefit Corpn. Sdn. Bhd. Such being the state of evidence, the inference that it must have been Sadong that wrote the answers cannot be had. It must be established who in Sadong wrote the answers to determine whether the act of that person can be regarded as that of Sadong. The plaintiff had therefore failed to discharge its burden of proving that Sadong wrote false answers.

[3] Non-disclosure of previous loss by fire, a fact which any insurer would definitely bring to bear as it may influence the decision whether to reject the application for a policy, also entitles the insurer to avoid the policy.

[Plaintiffs' claim dismissed with costs].

Cases referred to:

Attorney-General for Ceylon v. Silva [1953] AC 461 ***(foll)***

Newsholme Bros. v. Road Transport & General Ins. Co. Ltd. [1929] 2 KB 356 ***(cit)***

China Insurance Co. Ltd. v. Ngau Ah Kaw [1972] 1 MLJ 52 ***(cit)***

Dunn v. Dunn [1949] p. 98 ***(cit)***

Container Transport International Inc. v. Oceanus Mutual Underwriting Association [1984] 1 Lloyd's Rep. 476 ***(foll)***

Zurich General Accident v. Morrison [1942] 2 KB 53 ***(cit)***

Locker v. Western Australian Insurance Co. Ltd. [1936] 1 KB 408 ***(cit)***

Legislation referred to:

Insurance Act 1963, ss. 16A, 44A
Interpretation Act 1967

Other sources referred to:

Is the Reasonable Insured a Prudent Insurer? - A Consideration of the Test of Materiality in Insurance Contracts, Joanna Rasamalar Jeremiah [1993] 2 MLJ xcvii

For the plaintiff - Mirdin Mamdin; M/s. Chin, Mirdin & Co.
For the defendant - James Ghani; M/s. James Ghani & Co.

JUDGMENT

Ian H.C. Chin J:

I. History of case

This action concerns a claim by an insured Syarikat Tai Yuen Supermarket (Tawau) Sdn.

Bhd. ("the plaintiff") for RM376,920.85 under a policy for losses suffered as a result of a fire on 13 July 1986. Mercantile Insurance Sdn. Bhd., the first defendant ("the defendant") was the insurer. The action against the second defendant called Sadong Agency Sdn. Bhd. ("Sadong") was abandoned. The trial of this action concerns only the plaintiff and the defendant.

II. The pleadings

Since some of the problems that emerged in this case came as a result of the pleadings, the relevant part of the amended statement of claim, the defence and reply are reproduced here:

Statement of claim

1. ...
2. ...
3. On or about 7 June 1986, the plaintiff through its managing director Liew Koon Siong and having been solicited several times previously by Sincere Agency Service Sdn. Bhd. the agent of the first and second defendants made a proposal and/or an offer to insure with the first defendant against loss or damage caused by fire upon the plaintiff's property situated at Block B, Lot 9 - 10, Bandar Sabindo, Commercial Warehouse Tawau.
4. The said agent orally represented to the plaintiff that it was not necessary for the plaintiff to fill the said proposal form as the said agent knew what particulars to post in the said proposal form.
5. Further at all the material time the plaintiff did not ever expressly and/or impliedly request the said agent to complete the said proposal form for and/or on its behalf.
6. In reliance upon the matter contained in paragraph 4 hereinbefore mentioned the plaintiff merely signed the said proposal form leaving the rest in blank to be completed by the said agent.
7. The incidence of insurance agents such as perpetrated by the said agent completing the proposal forms is so common and abated that it would be reasonable for the plaintiff to hold that the same had at all time/material time the authority conferred by the defendants and/or alternatively the apparent authority so to do.
8. Further at all material times the said agent had in its possession a number of blank proposal forms that made it appear to the plaintiff that the same had the apparent/ostensible authority to complete the proposal forms.
9. Further the absence of any express provision in the said proposal form limiting the authority of the said agent sufficiently indicates the holding out by the first and second defendants of the said agent's authority to complete the said proposal form for and on behalf of any proposers such as the plaintiff.
10. The said proposal was accepted by the second defendant and by a policy of insurance No. 6/86/f/0253/SAKK dated 25 June 1985 the first defendant in consideration of premiums paid and to be paid upon the terms of the said policy agreed to insure the plaintiff's property against loss by fire.

.....

11. On 13 July 1986 whilst the said policy was in force the property insured were destroyed by fire...

Particulars of Damage

.....

Total amount damaged: RM376,920.85

12. ...
13. By letter dated 14 July 1986 the plaintiff notified the defendants of the said loss... but the first defendant by a letter... dated 28 April 1987 repudiated all claims.

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Defence

1. The 1st defendant admits paragraph 1 of the statement of claim.
2. The 1st defendant is not aware of paragraph 2 of the statement of claim.
3. The 1st defendant denies the allegations under paragraphs 3, 4, 5, 6, 7, 8 & 9 and further reiterate that the 1st defendant is not aware of the existence of the so-called Sincere Agent Service [Sdn. Bhd.], mentioned under paragraph 3 of the statement of claim.
4. If Sincere Agent Service [Sdn. Bhd.] was the agent for the 1st defendant, which the 1st defendant denies, and if they had acted as claimed in the statement of claim under paragraphs 3, 4, 5, 6, 7, 8, 9 & 10, the so-called agent must have acted outside the scope of their authorities, and in the alternative, the 1st defendant denies that Sincere Agent Service [Sdn. Bhd.] is its agent.
5. The 1st defendant admits that the plaintiff's proposal was accepted on 25 June 1986, but on the strength of a clean application.
6. The plaintiff did not disclose in their proposal of their previous history of damage by fire.

7. The 1st defendant therefore alleges that the plaintiff were themselves fraudulent by misrepresenting in their proposal that the plaintiff had never incurred damages by fire.

.....

8. ... denies all the liabilities...

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Reply to Defence

1. ...
2. In reply to paragraph 2 of the defence the plaintiff says that the 2nd defendant is the underwriter for and/or agent of the 1st defendant.
3. In reply to paragraph 3 and 4 of the defence the plaintiff says that the said Sincere Agency Service [Sdn. Bhd.] had been the agent of the 1st and 2nd defendants and that the agent's representation, the plaintiff's non-request, the plaintiff's signing of the proposal form by reasons that the said agent knew of what to post, the agent's apparent authority, possession of blank forms and absence of a limitation of power are all palpable.
4. In reply to paragraphs 5, 6, 7 and 8 of the defence the plaintiff says that in the event that there is non-disclosure (which the plaintiff denies), then the same is imputed upon the 1st and 2nd defendants as the said agent had been the agent of the 1st and 2nd defendants by reason that the plaintiff did not request the said agent to fill the proposed form. Furthermore, the plaintiff says, the said agent had all along personal knowledge of what to be posted in the said form which the plaintiff believed and acted upon and hence the plaintiff signing a blank proposal form.

III. The issues

What then should the issues be in this case? At the hearing on 5 August 1992 both Counsel, Mr. Mirdin Mamdin for the plaintiff and Mr. James Ghani for the defendant, had said that there was only one issue and that is - whether Sincere Agency Service (the name stated in the statement of claim before its amendment) was at the time of filling up the proposal form the agent of the plaintiff or of the defendant. The trial did not then proceed because Counsel were not ready. When the Court resumed sitting on 23 September 1993 Counsel for the parties cannot agree on what the issues are in this case. Therefore, it has to be ascertained from the pleadings what the issues are. The relevant assertions of the plaintiff in the statement of claim (after amendment) can be summarised as follows:

1. Sincere Agency Service Sdn. Bhd. ("Sincere") was the agent of the defendant and "Sadong";
2. On 7 June 1986 one Liew Koon Siong on behalf of the plaintiff made a proposal for an insurance with the defendant after the plaintiff was solicited by Sincere;
3. The following events concerning the plaintiff and Sincere occurred, *viz*:
   a. Sincere orally represented to the plaintiff that the plaintiff need not fill the proposal form as Sincere knew what particulars to post in the said proposal form;
   b. The plaintiff did not request Sincere to complete the said form;
   c. The plaintiff signed the form leaving Sincere to complete the form.
4. Sincere had the apparent or ostensible authority of the defendant and Sadong to complete the proposal form on the grounds that:
   a. it was common for insurance agents like Sincere to complete proposal forms;
   b. the possession by Sincere of a number of blank proposal forms; and
   c. the absence in the proposal form of any prohibition or limitation of power of Sincere to complete the proposal form.
5. Sadong accepted the proposal and the defendant issued the policy.
6. A fire broke out on 13 July 1986 and destroyed or damaged property worth RM376,920.85 and the plaintiff notified the defendant of the fire on 14 July 1986 by a letter dated 20 September 1986.
7. The defendant repudiated liability by a letter dated 28 April 1987.

As for the defence, the following would be a correct summary:

1. It denies that Sincere was its agent and that even if it was, it was acting outside the scope of their authorities;
2. There was non-disclosure in the proposal form of a previous fire and of the fact that no other insurance company in Sabah was willing to insure the premises.

The statement of claim had already pleaded in anticipation of the defence and the reply to the

defence was a mere repetition of the statement of claim. It is clear from the pleadings that I have set out in full and in summary form and after taking into consideration the admissions made by the witnesses at the trial, that the issues should be:

1. whether Sincere was the agent of the defendant and of Sadong;
2. whether upon the following facts being proved Sincere had the apparent or ostensible authority of the defendant and of Sadong to complete the proposal form. *viz*:
    a. it was a common for insurance agents like Sincere to complete proposal forms;
    b. the possession by Sincere of a number of blank proposal forms; and
    c. the proposal form did not contain provision prohibiting or limiting the power of Sincere to complete the proposal form; and
3. whether the loss suffered by the plaintiff as a result of the fire was RM376,920.85.

During the trial evidence were led by the plaintiff that PW1 completed part of the proposal form and the incomplete form was sent to Sadong. From their closing speeches, it would appear that both Counsel have agreed that one of the issues would be whether Sincere was at the material time the agent of the defendant. Because of the absence of any objection from Counsel for the defendant, although the statement of claim was not amended, it is also an issue whether Sadong completed the proposal form and whether the act of Sadong completing the said proposal form made that act the act of the defendant. The additional issues apart from those in (1) to (3) which I have just summarised would appear to be whether Sadong filled in the false answers to questions 8 and 11 of the proposal form and whether, if Sadong had in fact filled in the said answers, Sadong was doing so as the agent of the defendant. I will now turn to the evidence of this case.

IV. The evidence

Patricia Chai Mon Nget ("PW1"), a former partner of a firm called Sincere Agency which later became the limited company Sincere, went to see Liew Koon Siong ("PW2"), the managing director of the plaintiff, in June 1968, to sell the plaintiff a fire risk insurance policy at which time Sincere was already incorporated. She met him several times and each time she carried with her a proposal form. PW2 agreed to take up the policy and signed a proposal form (exhibit P1(a) - (d)). She testified that she wrote the answer "No" to question 8 of the proposal form and the answer, "Five years partnership with Mr. Lim Ket Vun & Liew Koon Siong" to question 10. As for the rest of the answers appearing in the proposal form, she said they were not written by her nor by PW2 and that she did not know who wrote them. After filling up the said answers to questions 8 and 10 and after PW2 had signed the proposal form, she sent it to Sadong to let Sadong complete the proposal form as Sadong had all the information to complete the proposal form. She did not tell Sadong to complete the form but she at that time knew that the plaintiff had suffered previous fire, had claimed losses and had made a number of applications for insurance coverage but were rejected. The last time she saw the proposal form was just before she sent it to Sadong. She also said, when cross-examined, that it is not the normal practice to send incomplete proposal form to the underwriter and that it was important to provide the correct answers to questions 9 and 11 of the proposal form. She did not conclude the deal and therefore did not get any commission from the defendant.

The next and the only other witness for the plaintiff was PW2. He said he signed the proposal form when none of the answers now appearing thereon were written and they were not written in his presence. He signed the proposal form before its completion because he had given all the particulars to PW1 and PW1 had told him that she would fill up the proposal form. He received a cover note (exhibit P3) and a policy (exhibit P2); both issued by Sadong on behalf of the defendant. The premium for the policy was paid to a company called Multi-Benefit Corpn. Sdn. Bhd. and this company had told him that they can accept the proposal. He wrote the letter dated 20 September 1985 (exhibit P4) to the said company to inform them of a fire that occurred on 13 July 1986 and to inform them of the resulting damage. He admitted having taken out other policies before, that there was a previous fire and that there was rejection of previous application for a policy but he said he told PW1 all these facts. He also said that PW1 had offered to fill the proposal form for him. As regards the damage caused by the fire, he said he cannot find the list that was prepared showing in detail the items damaged by the fire and which support the amount of RM376,920.85

claimed by the plaintiff. That was all the evidence for the plaintiff.

The defence called Harold a/l Anthony Gomez ("DW1"), the agency manager of the defendant and who joined the defendant's company only in 1991. He had 12 year' experience in the insurance business. He gave a discourse on the classification of agents and the duty of disclosure by an intending insured. He testified that the answers to be given to questions 9 and 11 of the proposal form would constitute material facts and would influence the insurer in its decision as to whether to sell the policy. He gave evidence that "from the record" Sadong was the underwriting agent of the defendant in June 1986 but that "the record" does not show Sincere to be a direct agent or a sub-agent of the defendant. He testified that if Sadong had filled up the proposal form it was outside the scope of their authority. He also testified that the adjusters employed by the defendant had discovered that the plaintiff had suffered two previous fire losses and that the adjusters had estimated the loss suffered by the plaintiff to be RM163,123.81. Those are all the evidence for the defence.

V. Finding of facts

The evidence of both the plaintiff and the defendant which I have just set out are not in dispute and were not challenged at all. Despite a statement from the Bar on 5 August 1992 that they will work out an agreed statement of facts and yet, more than one year afterwards, no such agreed statement of facts was forthcoming. Time was wasted in taking down the evidence at the trial when all the evidence, of both the plaintiff and of the defendant, were, as they turn out, not in dispute. It is not only time that was wasted but money as well as DW1 came all the way from Kuala Lumpur to testify which otherwise would have been necessary if the agreed statement of facts had been settled by both Counsel. Given the fact that the evidence were not challenged I find the facts as they were summarised above subject to what I have to say hereinafter regarding and in relation to whether the evidence are sufficient to discharge the burden of proof that rests on the party concerned.

VI. Conclusions

It is my opinion that issue (1) is really not one. Whatever PW1 did and whether, a point raised by Counsel for the defendant, she was a director of Sincere, to which there was a total lack of evidence, is of no consequence because the complaint is not directed at the answers to questions 8 and 10 of the proposal form which PW1 wrote. The complaint is directed at the false answers to questions 9 and 11 which are that the plaintiff had not suffered previous damage by fire and that the plaintiff was never declined any insurance. Those answers were according to PW1 and PW2 not completed by them. So, it is immaterial whether Sincere was or was not the agent of the plaintiff or Sadong since it did not do the offending act of writing the false answers to questions 9 and 11. PW1 had stated that neither she nor Sincere was the agent of Sadong or the defendant. That is accepted as the truth, and this is because the evidence of PW1 and PW2 were not challenged, is

(a) PW2 signed the proposal form when none of the answers were yet given,
(b) PW1 did not write the answers to question 9 and 11 of the proposal form and
(c) PW1 sent the incomplete proposal form to Sadong.

As stated earlier, the plaintiff's case, as asserted in the pleadings, was that the proposal form was completed by Sincere and that Sincere was, when completing the form, the agent of the defendant. These assertions of the pleadings are not proven. In fact as the evidence turned out, the relevant part of the proposal form was not completed by PW1 or Sincere. The plaintiff failed in their claim as pleaded. But it is now the plaintiff's case that the relevant part of the proposal form containing the false answers was completed by Sadong to which I will deal with later. Counsel for the plaintiff had additionally argued that PW1 being the alter ego of Sincere had knowledge of the previous damage by fire and of the previous refusal to insure by other insurers and thus such knowledge became that of the defendant with the result that the defendant cannot decline liability. Given the very little evidence there are in this case, I do not see how I can conclude that Sincere or PW1 was, for the purposes of the imputation of the said knowledge, the agent of the defendant. It was argued by Counsel for the plaintiff that the fact that

(1) PW1 saw PW2 several times with a proposal form (and not with a number of forms as submitted by Counsel for the plaintiff),
(2) that there was no restriction as to who could solicit the policy,

(3) that the proposal form allows anyone to insert his/her name as the agent and does not contain any restriction limiting the authority of any agent,
(4) that Sadong and the defendant did not query the action of PW1 in soliciting the policy and
(5) that PW2 did not fill up the proposal form, all go towards establishing that Sincere or PW1 was the agent of the defendant and therefore the knowledge must be imputed to the defendant.

It is my opinion that all the matters referred to by Counsel for the plaintiff as establishing ostensible or apparent authority did not amount to a representation by the defendant which representation is necessary. Thus, it is said in *Attorney-General for Ceylon v. Silva* [1953] AC 461, at p. 479 per Mr. L.M.D. de Silva:

> All 'ostensible' authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal.

All that was shown was that PW1 had brought with her a proposal form belonging to the defendant to see PW2 and that the proposal form contained no restriction as to who can be the agent or what the agent can do. All these do not amount to a representation by the defendant. Though PW1 did not say so it was obvious to her that if she were to write, in answer to questions 9 and 11 of the proposal form, that there were previous damage by fire and that there was a previous rejection of an application for a policy, the proposal form or request of the plaintiff for a policy would in all probability be rejected. In order to avoid that, she probably left it blank so that someone else could fill in the fraudulent answers and, in this case, Sadong, to which she forwarded the proposal form. It is in the evidence of PW1 that Sadong knew all the particulars, which I take it to mean and to include the particulars of the previous damage by fire and of the previous rejection of an application for a policy and therefore, assuming (whether there is in fact any evidence, I will deal with later when I deal with issue (2)) that Sadong has completed the form, it would have been done fraudulently knowing fully well that the answers to questions 9 and 11 were false. It was the law that in such a case the knowledge cannot be imputed to the defendant. The authority for this principle of law can be found in the case of *Newsholme Bros. v. Road Transport & General Ins.* Co. Ltd. [1929] 2 KB 356 (cited with approval in the case of *China Insurance Co. Ltd. v. Ngau Ah Kaw* [1972] 1 MLJ 52). In that case an insurance proposal form signed by the proposer contained untrue answers which were warranted to be true and which formed the basis of the contract. The answers were filled in by the insurance company's agent, whom the proposer had requested or permitted to fill in the form after informing him of the true facts. It was held that the company were entitled to repudiate liability on the ground of the untrue answers. The agent, in filling in the form, was the agent of the proposer. If the agent knew that the answers were untrue, he was committing a fraud which prevented his knowledge being the knowledge of the company; if he did not know, he had no knowledge to be imputed to the company. But the law appears to have been changed by s. 44A of the Insurance Act 1963, which came into effect on 1 August 1983 and it reads:

> 44A. Knowledge of and statement by authorised agent to be deemed knowledge and statement by insurer.
>
> (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.
> (2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of s. 16A or any other provision of this Act by such person.
> (3) This section shall not apply -
>
> (a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or
> (b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

Section 16A, referred to in s. 44A of the Insurance Act 1963 reads:

> 16A. Misleading statement, promise, or forecast inducing person to enter into contract of insurance.
>
> Any person who by any statement, promise, or forecast which he knows to be misleading, false, or deceptive, or by any fraudulent concealment of a material fact, or by the reckless making (fraudulently or otherwise) of any statement, promise, or forecast which is misleading, false, or deceptive, induces or attempts to induce another person to enter into or offer to enter into any contract of insurance with an insurer shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding one year or to both.

I take it that s. 44A of the Insurance Act 1963, has the effect of putting it out of reach of an insurer to set up as a defence the false answers in a proposal form when such answers were inserted by its authorised agent and when such answers were to the knowledge of its authorised agent false save where there was collusion or connivance and save where the person has ceased to be an agent of the insurer and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general of such cessation. What then is the meaning of the words "authorised agent" appearing in s. 44A of the Insurance Act 1963? The words "authorised agent" have not been defined in either the Insurance Act 1963 or the Interpretation Act 1967. I am of the opinion that the words "authorised agent" refer to an agent who has the actual, as distinct from apparent or ostensible, authority of the insurer because the section also speaks of the cessation of authority of the agent and there is no question of cessation of authority if there was no actual authority in the first place. Therefore, in so far as Sincere or PW1 are concerned they are not an authorised agent of the defendant since the evidence show that they were in fact not authorised agent and s. 44A of the Insurance Act 1963, cannot be resorted to be the plaintiff in so far as Sincere or PW1 are concerned. As regards Sadong it is not in dispute that it is the authorised agent of the defendant but what is called into question is whether Sadong did in fact write the answers to questions 9 and 11 of the proposal form and to that issue I will now turn to.

Did Sadong write the answers to questions 9 and 11 of the proposal form? I embarked on this issue with a certain amount of trepidation because, as I have stated earlier, the pleadings actually assert that it was Sincere that wrote the false answers to questions 9 and 11. But there was no protest from Counsel for the defendant. The only evidence in this regard is from PW1 who said that the proposal form, after she had wrote the answers to questions 8 and 10 and after PW2 had signed it, was sent to Sadong with the rest of the questions unanswered. There was no direct evidence at all that Sadong or someone from Sadong had written the answers to questions 9 and 11. The burden of proving Sadong wrote the answers to questions 9 and 11 rests with the plaintiff since the plaintiff so asserts. Counsel for the plaintiff submitted that (1) since the proposal form was sent to Sadong without questions 9 and 11 being answered and that the proposal form was later discovered with questions 9 and 11 answered and (2) since Multi-Benefit Corpn. Sdn. Bhd., a sub-agent of Sadong, had collected the premium from the plaintiff, it can be inferred that it must be Sadong that wrote the answers to questions 9 and 11. At the end of the case the Court has to ask itself - has the legal burden of the plaintiff of proving that Sadong wrote the false answers to questions 9 and 11 been discharged? See *Dunn v. Dunn* [1949] p. 98, Denning LJ regarding the burden of proof. Because more than one possibility exists regarding what happened to the proposal form after it was sent to Sadong I am not justified in inferring that the answers to the questions 9 and 11 of the proposal form must have been written by Sadong. In the first place, Sadong had to act through an authorised human hand to write the answers. In this respect, there is no evidence whatsoever. The possibility exists that the answers may have been written by someone other than Sadong such as Multi-Benefit Corpn. Sdn. Bhd. Such being the state of evidence, the inference that it must have been Sadong that wrote the answers cannot be had. It must be established who in Sadong wrote the answers to determine whether the act of that person can be regarded as that of Sadong. The plaintiff had therefore failed to discharge its burden of proving that Sadong wrote the false answers. Counsel for the plaintiff at a very late stage of the proceeding applied for an adjournment to call Sadong but was unable to say, to a question from the Court, as to who from Sadong was to be called as a witness and this resulted

in the application being refused. The plaintiff should have called someone from Multi-Benefit Corpn. Sdn. Bhd. to shed light on the completion of the proposal form. After all it was revealed in the course of the trial that Multi-Benefit Corpn. Sdn. Bhd. was the beneficiary of the commission that was paid in respect of the questioned policy and as such this company must know who completed the proposal form if it did not complete the proposal form. Multi-Benefit Corpn. Sdn. Bhd. was not called as a witness resulting in the failure of the plaintiff to prove that it was Sadong that wrote the answers to questions 9 and 11.

It was not argued that the false answers in the proposal form did not entitle the defendant to repudiate liability but Counsel for the plaintiff spent some time in questioning DW1 in that regard. Given the confusion surrounding the pleadings and the questions directed at DW1 by Counsel for the plaintiff I think it best that I also address myself on this point. The law can be summarised thus. The insured must disclose all facts material to a prudent insurer's appraisal of the risk that he is insuring, assuming such facts are known or are deemed to be known to the insured, but are not known or are deemed not to be known by the insurer (*Container Transport International Inc. v. Oceanus Mutual Underwriting Association* [1984] 1 Lloyd's Rep. 476 at p. 497, per Kerr LJ, p. 512, per Parker LJ and p. 519, per Stephenson LJ). A circumstance will influence an insurer if it bears upon the risk or is something to which the insurer would wish to direct his mind (*C.T.I. v. Oceanus*, above). It does not have to be shown that an insurer would have changed his course of action either as to accepting the risk or in fixing the premium, it is enough that the insurer would wish to bring it to bear (*Zurich General Accident v. Morrison* [1942] 2 KB 53, at p. 60). Whether the particular insurer would have been insured is irrelevant. The test is whether it would influence a notional "prudent insurer" (*C.T.I. v. Oceanus* (above) p. 495, per Kerr LJ. and p. 509, per Parker LJ. and the article **"Is the Reasonable Insured a Prudent Insurer? - A Consideration of the Test of Materiality in Insurance Contracts"** by Joanna Rasamalar Jeremiah [1993] 2 MLJ xcvii). Non-disclosure of a previous refusal of motor insurance is non-disclosure of a material fact in the proposal for fire insurance which entitled the insurer to avoid the policy (*Locker v. Western Australian Insurance Co. Ltd.* [1936] 1 KB 408). I am also of the opinion that non-disclosure of previous loss by fire, a fact which any insurer would definitely bring to bear as it may influence the premium payable or influence the decision whether to reject the application for a policy, also entitles the insurer to avoid the policy. On the authorities I have just cited, I am of the conclusion that the defendant is entitled to repudiate liability on account of the non-disclosures resulting from the false answers to questions 9 and 11 of the proposal form.

Since the plaintiff had failed to establish liability the question of damages does not fall to be considered. I therefore dismiss the plaintiffs' claim with costs to be taxed.